In The

Supreme Court of the United States

October Term, 1978

No. 78-213

CALVIN AUGER, Warden,
Iowa Men's Reformatory,
Petitioner,

vs.

GARY JAMES COLLINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The Petitioner, State of Iowa, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 8, 1978.

—o—

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, not yet reported appears as Appendix A hereto. The opinion of the District Court of the Southern District of Iowa is reported, *Collins v. Auger,* 428 F. Supp. 1079 and appears as Appendix B hereto. The opinion of the Supreme Court of Iowa has also been published, *State v. Collins,* 236 N. W. 2d 376 (1975) and appears as Appendix C hereto.

—o—

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on May 8, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254.

—o—

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit erred in its determination that Respondent's failure to specifically object to the admissibility of a confession in trial court on due process grounds would not preclude the federal court from finding an adequate contemporaneous objection so as to sustain a writ of habeas corpus.

2. Whether the Eighth Circuit Court of Appeals properly applied an adequate test of the prejudice that

must be shown to overcome the bar of federal review as set out in *Wainwright v. Sykes.*

3. Whether the Eighth Circuit erred in holding that Respondent's right to due process under the Fourteenth Amendment to the United States Constitution was violated when Respondent's incriminating admissions to a psychiatrist during a psychiatric examination were admitted in evidence as part of the prosecution's case to establish Respondent's guilt.

4. Whether the Eighth Circuit erroneously concluded the Petitioner conceded in federal district court that Respondent had exhausted his state remedies on the constitutional issues raised in Respondent's petition for writ of habeas corpus.

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V, VI, and XIV of the Constitution of the United States are set forth in Appendix D.

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STATEMENT OF THE CASE

Respondent, Gary James Collins, was convicted in state court on July 18, 1974, of the crime of assault with intent to commit rape in violation of § 698.4 of the Iowa Code (1973). The Iowa Supreme Court affirmed the conviction. *State v. Collins,* 236 N. W. 2d 376 (Iowa 1975).

A petition for a writ of certiorari was denied by the United States Supreme Court. *Collins v. Iowa,* 426 U. S. 948 (1976).

On July 1, 1976, Respondent filed a petition for writ of habeas corpus alleging that the admission of a confession in his trial was in violation of the Supreme Court's decision in *Miranda v. Arizona,* 384 U. S. 436 (1966) and his rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. On March 30, 1977, the federal district court granted the petition on the ground that the use of Respondent's "incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecution's case to establish his guilt" was in violation of his right to due process under the Fourteenth Amendment to the United States Constitution. The Respondent's petition for writ of habeas corpus was sustained on the condition that it would be suspended in the event of an appeal being taken by Petitioner.

On April 29, 1977, Petitioner did appeal to the United States Court of Appeals for the Eighth Circuit which, following the intervening decision by the Supreme Court in *Wainwright v. Sykes,* 433 U. S. 72 (1977), remanded the cause to the district court for a certification of findings on the following questions:

> "1. Whether petitioner made an adequate contemporaneous objection in the state court to the use of the psychiatrist's statements containing his admission of guilt in order to preserve his constitutional objections now asserted in this proceeding; and
>
> "2. If not, whether under the *Wainwright* rule and as earlier defined in *Francis v. Henderson,* 425 U. S. 536 (1976), petitioner has shown 'cause' and 'actual prejudice' in not making such objection."

Upon remand, the district court certified that Respondent did not make an adequate contemporaneous objection in the State court to the use of the psychiatrist's statements containing his admission of guilt in order to preserve constitutional objections asserted in the habeas corpus petition. Although the district court did find Respondent had shown sufficient "cause" for failure to make a proper objection, the district court found that Respondent failed to reveal any "actual prejudice" which may have resulted from the introduction of defendant's statement's in evidence.

Upon appeal, the United States Court of Appeals for the Eighth Circuit reversed the findings made by the district court, ordered the judgment vacated, and further ordered the cause to be remanded for further proceedings consistent with its opinion. *Collins v. Auger,* — F. 2d — (8th Cir., filed May 8, 1978). It is from this decision which Petitioners seek a review by this Court.

The events leading to the trial and conviction of Respondent, Gary James Collins are as follows:

Mrs. Jessie Andrews, prosecutrix, an 82-year old resident of Newton, Iowa, admitted a man into her apartment on the evening of January 6, 1974, so that he might use her telephone to call a friend to come to pick him up in his car. While the man was using the telephone, Mrs. Andrews prepared two peanut butter sandwiches which she gave the man, saying, "This will get you started on your way." The man made a statement to the effect that he was going to rape Mrs. Andrews, and she ordered him

out of the house. The man then grabbed the front of Mrs. Andrews' dress and ripped the dress off of her. He beat the prosecutrix severely, bruising her chest, knocking out several teeth, and rendering her unconscious. She required hospitalization, did not fully regain consciousness for several days, and continues to suffer lapses of memory. However, no actual rape was ever completed.

Respondent was arrested for public intoxication while walking on foot in the vicinity of Mrs. Andrews' apartment shortly after the crime was committed. Subsequent investigation revealed that Respondent's footprints matched those found in the snow outside Mrs. Andrew's home. Respondent's fingerprint matched a latent print found in the apartment, and Mrs. Andrews identified Respondent as her assailant.

On January 31, 1974, Respondent filed an application for a medical examination to determine his competency to stand trial and his mental condition at the time of the offense. Pursuant to court order, Respondent was admitted for psychiatric evaluation at the Iowa Security Medical Facility at Oakdale and was examined there by Dr. Romullo Lara, a staff psychiatrist. During these examinations, Respondent confessed that he was Mrs. Andrews' attacker and provided accurate details of the crime. At Appellee's trial, Dr. Lara related the substance of these statements during examination by the prosecutor. Dr. Lara also testified that he did not seek this information, and that at no time did he indicate to Respondent that his statements would not be repeated.

REASONS FOR GRANTING THE WRIT

I. To enable this Court to correct the erroneous determination that Respondent's failure to specifically object to the admissiblity of a confession in trial court on due process grounds would not preclude the Federal Court from finding an adequate contemporaneous objection so as to rule on such grounds on appeal.

A review of the decisions of the Supreme Court of the United States indicates that the question as to what constitutes an adequately specific contemporaneous objection to preserve error of constitutional issues asserted in a federal habeas corpus petition has yet to be decided. However, the decision reached in the instant case by the United States Court of Appeals for the Eighth Circuit is contrary to the body of law in both the state and federal courts. *Collins v. Auger*, No. 77-1469, 8th Cir. Ct. of Appeal, May 8, 1978.

Counsel for Respondent interposed objections at trial asserting, on different occasions, three grounds: (a) that the statements were in violation of Petitioner's *Miranda* rights, (b) that the statements were hearsay and (c) that part of the statements revealed the commission of a crime for which Respondent was not charged. On appeal to the Iowa Supreme Court, the only issue before that court was whether the admission of the statements into trial violated Respondent's *Miranda* rights. It was not until this case was brought before the federal district court that Respondent alleged the admission of the statements violated fundamental due process in violation of the Fourteenth

Amendment to the United States Constitution. *Collins v. Auger*, 428 F. Supp. 1079 (S. D. Iowa 1977).

Under Iowa law, to be sufficient an objection must be specific and timely. The specificity demanded must signify that there is an issue of law and then give notice of the terms of that issue. *State v. Miller*, 204 N. W. 2d 834, 841 (Iowa 1973). In *State v. Droste*, 232 N. W. 2d 483 (Iowa 1975) the Iowa Supreme Court stated:

> "The Court to which the evidence is offered is entitled to know on what grounds it is challenged and should not be left to speculate as to whether the evidence is in fact subject to some infirmity which the evidence does not point out. A specific objection, if overruled, cannot avail the objector except as to the ground specified since the court is not bound to look beyond the ground of the objection thus stated. Every ground of exception which is not particularly specified is considered as abandoned. (Cited omitted)" 232 N. W. 2d at 487.

The Iowa Courts have strictly enforced the rule that sufficient and specific objection to evidence must be made contemporaneously with the offer of the evidence. For example, in *State v. Harmon*, 238 N. W. 2d 139 (Iowa 1976), an objection to evidence at trial urged that the proferred statement was hearsay and prejudicial. On appeal it was urged the evidence was so prejudicial as to outweigh its probative value since although it was offered to impeach it would be considered by the jury as substantive evidence. The Supreme Court held the hearsay objection at trial did not raise the issue urged on appeal. 238 N. W. 2d at 143. In *State v. Entsminger*, 160 N. W. 2d 480 (Iowa 1968) the Supreme Court stated an objection, "there had been no showing the evidence was legally obtained", was insufficient to raise on appeal the question of illegal search and seizure. 160 N. W. 2d 482-483. (The court in *Entsminger* ruled on the merits however because of the importance the question presented to law enforcement agencies).

The United States Court of Appeals for the Fifth Circuit was presented with a similar issue in *Jiminez v. Estelle*, 557 F. 2d 506 (5th Cir. 1977). In *Jiminez*, defendant objected to admission in evidence of his prior convictions on the grounds that it was hearsay and that it violated his confrontation rights under the Sixth Amendment to the United States Constitution. Defendant did not assert objections at trial based on violation of his due process rights under the Fourteenth Amendment. However, the alleged due process violations were later asserted by the defendant on appeal. Relying on the United States Supreme Court's decision in *Wainwright v. Sykes*, 433 U. S. 72 (1977), the court on *Jiminez, supra*, held that defendant's failure to object on the specific due process grounds at trial precluded its assertion on appeal absent a showing of "cause" and "prejudice". The court noted that the failure to raise specific objections to alleged constitutional errors at trial precluded its assertion on appeal because the defendant had not complied with the contemporaneous objection standards set forth by the state. *Jiminez v. Estelle, supra* at 510.

In *Pobliner v. Fogg*, 438 F. Supp. 890 (S. D. N. Y. 1977), defendant's counsel made both pre-trial and trial objections raising Fourth Amendment claims to certain allegedly tainted evidence and testimony. Although defendant made specific objections to the testimony of two

of the State's witnesses, defendant failed to assert any objection to the testimony of a third State's witness. Defendant attempted to assert alleged constitutional errors as to the introduction of the testimony of the third witness on appeal. The Court in *Pobliner, supra*, held that defendant had an obligation as the trial progressed to raise specific objections to the introduction of testimony as it was presented. Failure to make the same specific objections as to the testimony of the third witness as was accomplished with previous State's witnesses precluded the appeal because of non-compliance with the State's contemporaneous objection standards.

In the instant case, the United States Court of Appeals for the Eighth Circuit held as follows:

> "Although defense counsel did not specifically challenge the admissibility of the confession in the trial court on due process grounds, the fact remains that repeated objections were made at trial to the admission of the statements. The record thus indicates that the trial court, as well as the Supreme Court of Iowa, was alerted to evidentiary and constitutional issues pertaining to the confession's admissibility. As Judge Stuart recognized, since one member of the Supreme Court of Iowa dealt with the due process issue, it must have been brought to the state court's attention. We conclude that petitioner asserted an adequate contemporaneous objection in the state proceedings."

To equate an adequate contemporaneous objection with the number of objections raised at trial pertaining to specific evidence or testimony is clearly erroneous. An adequate contemporaneous objection must be one which alerts trial court to specific alleged errors at the time they occur.

II. To enable this Court to further define and properly apply an adequate test of the prejudice that must be shown to overcome the bar of federal review as set out in Wainwright v. Sykes.

The Supreme Court of the United States has explicitly declined to define "cause" or "prejudice" under their decision in *Wainwright v. Sykes*, 433 U. S. 72 (1977). In *Wainwright* this Court said (433 U. S.):

> "The 'cause' and 'prejudice' exception of the Francis rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here."

Noticeably the issue arises in *Wainwright* because of a failure by the Petitioner: no contemporaneous objection was made to evidence offered at trial. Thus even in a situation where the error would call for an automatic reversal had the error been preserved, the showing of prejudice is required. In *Francis v. Henderson*, 425 U. S. 536 (1976), the immediate precursor of the *Wainwright* rule, a habeas corpus Petitioner was sent back to District Court to determine if there was actual prejudice, despite the District Court's earlier finding that Negroes had been impermissibly excluded from the grand jury that had returned the indictment *Francis, supra*, 425 U. S. at 538. This despite the fact that automatic reversal of convictions resulting from trials heard by juries from which

Negroes have been excluded is the rule. See *Whitus v. Georgia,* 385 U. S. 545 (1967).

Francis additionally uses the term actual prejudice, which leaves no doubt that the prejudice referred to in *Wainwright* is not one that is presumed but can be overcome by a state showing it is harmless, but rather one that must affirmatively appear in the record or be shown by the Petitioner. *Kotteakos v. United States,* 238 U. S. 750 (1946) appears to provide some guidance in presenting the question.

> "[I]t would seem that any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of § 269 [28 USC 2111] but also to the expressed intent of its legislative sponsors. Indeed, according to their explicit statement, whether the burden of establishing that the error affected substantial rights or, conversely the burden of sustaining the verdict shall be imposed, turns on whether the error is 'technical' or is such that its natural effect is to prejudice a litigant's substantial rights.' " (Emphasis added.)

328 U. S. at 765.

Under the *Wainwright* and *Francis* rule we can clearly state that the burden "of establishing that the error affected substantial rights" is on the Petitioner. The reference to actual prejudice in those cases gives rise to the conclusion that the "natural effect" is not to be given to the alleged error even if that natural effect would be prejudicial but that the prejudicial effect must be shown. This does not mean prejudice cannot be read from facts on record. It does mean that the natural effect of a confession, which is clearly to influence a jury, will not be entertained, unless it is shown that the effect was

prejudicial and the conviction probably was a result of that confession. This does not mean that the conviction had to rest solely on the confession, but that without the confession a conviction would probably not have resulted. This brings us around to the test for prejudice which is urged by the Petitioner, and the distinction of prejudice from harmless error. If there is sufficient evidence to support a conviction without the challenged evidence, then the conviction should not be reversed.

Arguably this is too high a standard as it might not take into account the special circumstances of certain evidence which might inflame a jury. As an example, a confession might contain details of the crime which put the defendant in a particularly bad light even though they add no "facts" necessary to substantiate the fact that the defendant committed the crime. There is no such inflammatory evidence in the testimony regarding the instant Respondent's confession.

In *U. S. v. Agurs,* 427 U. S. 97 (1976) the Court presents a test clearly usable under the *Wainwright* rule. The question in *Agurs* is the omission of evidence rather than the admission of evidence and the test stated is burden on the Petitioner to show the materiality of the omitted evidence.

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." (Emphasis added.)

Agurs, supra, 427 U. S. at 112.

Applying this test to the present cause obviously requires some adjustment since we are here talking about alleged error in admitting evidence not in omitting evidence. But the test has special virtue which makes it proper to apply to a *Wainwright* situation. First, it was made to apply where there was some failure by a defendant. Second, it requires consideration of more than the bald facts included in the evidence. In an *Agurs* situation consideration must be given not only to what the facts themselves prove, but also to what an attorney could develop from them. In a *Wainwright* situation, consideration must be given to what the facts prove, and to the other effects the facts had on a jury.

The test then should be: Whether the deletion of the challenged evidence would give rise to a reasonable doubt as to guilt, where a reasonable doubt did not exist with the challenged evidence. In the instant case there would not be such a reasonable doubt absent the admission of the statement made to the doctor. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice. Respondent was arrested in the vicinity of the victim's apartment shortly after the crime was committed. Footprints which matched Respondent's were found in the snow outside the victim's home. Respondent's fingerprint was found in the victim's apartment, and the victim identified Respondent.

Recent lower court decisions which have applied the "cause" and "prejudice" test left undefined in *Wainwright, supra,* have regrettably declined to fashion any "precise content" to the terms "cause" or "prejudice", *Rinehart v. Brewer,* 561 F. 2d 126 (8th Cir. 1977); *White v. Estelle,* 566 F. 2d 500 (5th Cir. 1978); *Bromwell v.*

Williams, 445 F. Supp. 106 (D. Maryland 1977); *United States v. Patton,* 436 F. Supp. 881 (E. D. Pa. 1977).

At least one Court interprets the term "prejudice" as requiring a Petitioner "simply to show that the suppressible evidence could have contributed to the jury verdict, thus incorporating the harmless error standard of *Chapman v. California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)." *United States v. Underwood,* 440 F. Supp. 499, 503 (D. R. I. 1977).

At least two circuits have indicated that "prejudice" will be found where the evidence was clearly unconstitutionally admitted and constituted the sole evidence which convicted him. *Crowell v. Zahradnick,* 571 F. 2d 1257 (4th Cir. 1977); *Jiminez v. Estelle,* 557 F. 2d 506 (5th Cir. 1977).

In the instant case, the Eighth Circuit failed to apply the prejudice standard correctly. The State of Iowa urges the *Agurs* test should provide that standard, and that a showing of prejudice has not been made.

III. To enable this Court to correct the erroneous holding that a defendant's right to due process under the Fourteenth Amendment to the Constitution of the United States is violated when defendant's incriminating admissions to a psychiatrist during a psychiatric examination are admitted in evidence as part of the prosecution's case to establish defendant's guilt.

The admission of Dr. Lara's testimony as to petitioner's statements during the psychiatric examination did not undermine the fundamental fairness of petitioner's trial.

As the District Court correctly noted, and which was cited by the Eighth Circuit, petitioner had a constitutional right to raise a defense of insanity and a right not to be a witness against himself. The Court reasoned on the basis of *Simmons v. United States*, 390 U.S. 377 (1968) that petitioner could not be placed in a situation where one constitutional right could be exercised only at the expense of another, and therefore the Court concluded that the "tension" between the due process right to assert a defense and the Fifth Amendment privilege against self-incrimination was constitutionally impermissible. This rationale, while initially appealing, has been seriously questioned by the Supreme Court in decisions following *Simmons*, and Petitioner suggests that the proposition on which the District Court and the United States Court of Appeals for the Eighth Circuit based its decision is no longer favored by the Supreme Court.

In the 1970 guilty plea trilogy *(Brady v. United States*, 397 U.S. 742; *McMann v. Richardson*, 397 U.S. 759; *Parker v. North Carolina*, 397 U.S. 790), the Court indicated that the threat of increased punishment for pleading not guilty or the promise of leniency in return for a guilty plea was not an overbearing of the will which would render a guilty plea involuntary, *Brady; Parker, supra*, and that where a defendant pleads guilty on the reasonably competent advice of counsel in order to obtain such leniency, the defendant is bound by that advice, although it later is found to be incorrect. *McMann; Parker, supra.* A defendant who follows the reasonably competent advice of counsel in choosing between exercising his Fifth and Sixth Amendment rights

by demanding a jury trial in which he would probably be convicted and waiving those rights in hope of a more lenient sentence will not be heard to complain that the advice later proved to be incorrect and the strategy selected was not the better of the alternatives. Clearly, the trilogy stands for the proposition that a defendant can be made to choose in the exercise of his constitutional rights.

Middendorf v. Henry, 425 U.S. 25 (1976), is additional support for this proposition. In that case, petitioners who had been convicted and sentenced by summary court-martial sought a declaratory judgment that the Sixth Amendment right to counsel applied to such proceedings, an injunction to bar the military from violation of this right, and writs of habeas corpus to free them from custody. The District Court granted all relief sought. The Court of Appeals granted relief only in cases where the defendant had made a timely and colorable claim that he had a defense or that there were mitigating circumstances the presentation of which required the assistance of counsel. The Supreme Court reversed, finding counsel was not required in summary court-martial. The Court reasoned that to the extent that the conditions of the Court of Appeals order were satisfied the defendant could refuse the summary court-martial and be tried in a special or general court-martial where an absolute right to counsel attaches. The Court acknowledged that such a decision would subject the defendant to the possibility of a more severe punishment if convicted, but held this situation is no different than that facing the defendants in the guilty plea trilogy. *Middendorf* demonstrates that the possibility of adverse

consequences of a strategic decision by a defendant does not make the decision itself unconstitutional, again contrary to the "tension" rationale of *Simmons*.

Garner v. United States, 424 U.S. 648 (1976), is further support for the Petitioner's position. In that case, Garner's income tax returns, which listed his occupation as "professional gambler" and showed substantial income from such activities, were introduced against him in his trial for conspiracy to use interstate transportation and communication facilities to "fix" sporting contests to demonstrate that his contacts with other members of the conspiracy were not innocent ones. Garner claimed that the use of the tax returns violated his privilege against self-incrimination and that he could not effectively exercise his right to remain silent because to do so would risk conviction for wilfully failing to file a return. The Court rejected this argument, finding the risk of a prosecution for incorrectly claiming a Fifth Amendment privilege was not such a burden on the privilege as to require the establishment of a preliminary ruling procedure for testing the validity of a claim of privilege. Thus, even the risk of conviction of a crime does not create constitutionally impermissible choice for a defendant.

The most explicit rejection of the *Simmons* theory is found in *McGautha v. California*, 402 U.S. 183 (1971), vacated in light of *Furman v. Georgia*, 407 U.S. 941 (1972). *McGautha* involved the claim by co-petitioner Crampton that the Ohio procedure of holding a unitary trial in capital cases was fundamentally unfair since the exercise of his right to present a defense of mitigating circumstances to reduce the sentence to life imprison-

ment would necessarily involve the waiver of his Fifth Amendment privilege against self-incrimination on the issue of guilt. The Court noted that the guilty plea trilogy had rejected this conception of fundamental fairness and stated:

> "While we have no occasion to question the soundness of the result in *Simmons* and do not do so, to the extent that its rationale was based on a 'tension' between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question and it certainly cannot be given the broad scope attributed to it by Crampton in the present case." 402 U.S. at 212-213.

Respondent's claim is strikingly similar to Crampton's. Both men sought to raise a defense which could only be exercised at the expense of the privilege against self-incrimination. Both men were convicted. Like Crampton, Respondent should be bound to the consequences of his choice and habeas relief should not be granted.

A defendant in a criminal case is necessarily faced with a number of hard choices involving the exercise or waiver of constitutional rights. A defendant who exercises his right to testify on his own behalf also waives his Fifth Amendment privilege as to cross-examination on reasonably related matters. *Brown v. United States*, 356 U.S. 148 (1958); *Fitzpatrick v. United States*, 178 U.S. 304 (1900); *Brown v. Walker*, 161 U.S. 591 (1896). A defendant who exercises his right to testify may be impeached by evidence of his prior criminal convictions. *Spencer v. Texas*, 385 U.S. 554 (1967), or by a confession obtained in violation of *Miranda*, *Harris v. New York*, 401 U.S. 222 (1971). A defendant whose motion

for a directed verdict at the close of the State's evidence is denied must decide whether to present a defense and to assume the risk that something may go awry and thereby bolster the state's case. *United States v. Parr*, 516 F. 2d 458 (5th Cir. 1975); *United States v. Calderon*, 386 U. S. 160, 164 (1954). A defendant who complies with a state notice-of-alibi rule risks having the witnesses listed therein used against him. *Williams v. Florida*, 399 U. S. 78 (1970). Respondent's choice was no more difficult than those permitted in the foregoing cases. Clearly, the Eighth Circuit erred in holding that it was fundamentally unfair to force Respondent to make a tactical decision involving the exercise of his constitutional rights.

IV. To enable this Court to correct the erroneous conclusion that Petitioner conceded in Federal District Court that Respondent had exhausted his State remedies on the constitutional issue raised in Respondent's Petition for Writ of Habeas Corpus.

It is well-settled law that a federal habeas petitioner must have exhausted his state remedies in order to be granted federal relief. *Picard v. Connor*, 404 U. S. 270 (1971); *Tyler v. Swenson*, 483 F. 2d 611 (8th Cir. 1973). Petitioner contends that Respondent has not sought state review of the claims relied upon by the Eighth Circuit, that such a remedy is available, and that this Court should allow the Iowa courts to decide whether there was sufficient reason for the failure to raise the claims in the state courts. This could be done under the Iowa Post-Conviction Relief Act, Iowa Code § 663A.

The petition in this case was vague, but seemed to raise only the issue of whether petitioner should have been given *Miranda* warnings prior to the psychiatric examination. The District Court appeared to agree, since it stated "[p]etitioner presents in this Court the same issue that was presented to the trial court in the form of motions and objections, to the Iowa Supreme Court on appeal, and in the petition for certiorari." *Collins v. Auger*, Civil No. 76-215-1 (S. D. Iowa, filed March 30, 1977), p. 1. The Iowa Supreme Court clearly indicated that only a *Miranda* claim was before that Court:

> "The sole issue raised in defendant's assignment of error is whether statements made by a defendant to a state psychiatrist examining him pursuant to a court order entered upon the defendant's application are admissible at trial when the statements were made without prior *Miranda* warnings to the defendant by the psychiatrist." *State v. Collins*, 236 N. W. 2d 376, 378 (Iowa 1975).

It is anomolous that the District Court would quote this passage *(Collins v. Auger, supra* at 5) and yet conclude that state remedies had been exhausted as to issues which the Iowa courts found were not raised at trial or on direct appeal. The District Court found exhaustion on its own and attributed to the Petitioner a concession of exhaustion. *Collins v. Auger*, 428 F. Supp. 1079, 1080 (1977). The United States Court of Appeals for the Eighth Circuit also found a concession of exhaustion. *Collins v. Auger*, No. 77-1469, 8th Cir. Ct. of Appeal, May 8, 1978, p. 4, fn. 1. Petitioner contends that such a finding is absolutely contrary to the facts.

The pleadings reveal the following pertinent allegations: the petition stated the issue as:

> "a. That without the benefit of appropriate warnings pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966), a state psychiatrist interviewed the Petitioner while in custody of a state security medical facility during the course of a Court ordered medical examination on competency to stand trial and testified at trial during the State's case in chief regarding the Petitioner's confession to him during the course of the competency examination.
>
> "b. That the introduction as a part of the State's case in chief of the Petitioner's confession to a state psychiatrist made while the Petitioner was in custody in a state security medical facility during the course of a Court ordered medical examination violated Petitioner's rights under the Fifth, Sixth, and/or Fourteenth Amendments to the Constitution of the United States."

The Return stated in pertinent part:

> "Respondent admits that the Petitioner has exhausted his state remedies on the specific issue here raised."

Respondent's brief and argument asserted there was not a concession of exhaustion of state remedies.

The pleading is, as stated above, vague. The constitutional challenge in Paragraph 3, subparagraph (b) of the Petition appears to be a catch-all pleading of constitutional violation. The only *specific* pleading of a *specific* constitutional violation was in Paragraph 3, subparagraph (a) which was the Miranda challenge. The Return answered that the "specific issue" raised had been raised in state court. It then went on to a general denial of the seeming general catch-all with an answer that was believed to be equivalent.

In the brief to the Court of Appeals for the Eighth Circuit and on oral argument, the State asserted there was no concession. Petitioner would accept an accusation of unclear pleading in the Return, but believes Respondent's petition was equally unclear. The lack of specificity is made clear by the Reply to the Return in which Petitioner states

> "Further, the Petitioner should not be forced to elect between his Sixth Amendment rights as to competency to stand trial and effective assistance of counsel and his Fifth Amendment right against self-incrimination. *Simmons v. U.S.,* 390 U.S. 377, 394 (1968)."

Reply in District Court, filed August 27, 1976. This specificity was clearly lacking in the original petition, and is the clear issue on which this case has proceeded in Federal court.

This issue was not raised in the State Court, and no such concession was ever made much less intended. The Eighth Circuit in accepting the alleged concession, cited *Jenkins v. Fitzberger,* 440 F. 2d 1188 (4th Cir. 1971). In that case the state attorney general "expressly requested" the federal court to reach the merits of the case. The State of Iowa has no such intention in this case and strenuously reasserts that there is no concession of exhaustion in fact or in intent.

Picard v. Conner, 404 U.S. 270 (1971), presented the Supreme Court which an analogous situation. Petitioner raised challenges to the legality of his indictment primarily on state grounds. The only federal question presented in his petition was to challenge the continued vitality of *Hurtado v. California,* 110 U.S. 516 (1884),

which held that the Fifth Amendment Grand Jury Clause did not apply to the States. On appeal from the District Court's denial of his petition, the same argument was made. There was no issue of concession in *Picard* but on its own motion the First Circuit Court raised the question of whether the state proceedings denied the petitioner equal protection of the laws. The State did not raise it initially. The Circuit Court gave the State the opportunity to submit a brief on this issue, in which the State raised the nonexhaustion issue. The Court decided that the State courts had had the opportunity to apply the equal protection principles to the facts of the case and granted the writ on the Fourteenth Amendment basis. The Supreme Court reversed on the exhaustion issue, holding that the claim must have been "fairly presented to the state courts," 404 U.S. at 275, in order to be raised in a federal habeas proceeding.

In this case, as in *Picard,* the bases upon which the writ was granted were neither advanced in the state courts nor specifically pleaded in the federal petition. Moreover, in the instant case the State was not even permitted the opportunity to respond to these new theories, as was the respondent in *Picard.* The policy of comity enunciated in *Picard* requires reversal of the District Court and of the three judge panel of the United States Court of Appeals for the Eighth Circuit.

Nor is there exhaustion to be found on the basis of the Iowa Supreme Court treatment of the issue. The special concurrence of Justice Rawlings is not sufficient to indicate that petitioner exhausted his state remedies. The majority opinion clearly indicates that only the *Miranda* issue was considered. Justice Rawlings himself stated, "Confining myself, *as does the majority,* to the sole *Miranda* warning issue asserted by defendant in support of a reversal, I too find an affirmance is in order." *State v. Collins, supra,* at 379. (Emphasis added.) The Iowa Supreme Court indicated that the question raised by the special concurrence in *State v. Collins,* has not yet been reached by the Court when they stated in *State v. Nowlin,* 244 N.W. 2d 596, 603 (Iowa 1976): "We need not decide in this case whether the trial court was required to follow the standard advocated in the *Collins* special concurrence." It is clear that the issues relied upon by the District Court were not "fairly presented to the State courts." *Picard, supra,* at 275.

Petitioner did not present his due process, equal protection and voluntariness claims to the Iowa courts, and thus has not exhausted his state remedies.

CONCLUSION

This Court should grant certiorari and find that there has been no exhaustion of remedies and that the contemporaneous objection rule requires more than simple notice that a person seeks to object to evidence. It is also necessary to define further the cause and prejudice standard and determine whether they were properly applied. The State urges that the Court of Appeals for the Eighth Circuit erred in their determinations on those questions, and in the interest of justice in this case, and to prevent further problems caused by the erroneous precedent, the decision of the Eighth Circuit should be overturned.

CERTIFICATE OF SERVICE

I, Thomas D. McGrane, Assistant Attorney General for the State of Iowa, hereby certify that on the 5 day of August, 1978, I mailed three (3) copies of Brief for Petitioner, correct 1st class postage pre-paid to:

Keith Uhl
Scalise, Scism, Gentry, Brick & Brick
909 Fleming Building
Des Moines, Iowa 50309

I further certify that all parties required to be served have been served.

THOMAS D. McGRANE
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1469

In the Matter of the Application of
Gary James Collins for a Writ of Habeas Corpus.

Gary James Collins,
Appellee,

vs.

Calvin Auger, Warden,
Iowa Men's Reformatory,
Appellant.

Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: March 15, 1978
Filed: May 8, 1978

Before LAY and ROSS, Circuit Judges, and LARSON,*
Senior District Judge.

LAY, Circuit Judge.

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* Earl R. Larson, Senior District Judge, District of Minnesota, sitting by designation.

Gary James Collins was convicted of assault with-intent to commit rape, in the Iowa state court; his conviction was affirmed on direct appeal. *State v. Collins,* 236 N. W. 2d 376 (Iowa 1975), *cert. denied,* 426 U. S. 948 (1976). He thereafter sought a writ of habeas corpus in the federal district court, alleging that the admission of a confession in his state trial was in violation of *Miranda, v. Arizona,* 384 U. S. 436 (1966), and resulted in a denial of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments. The district court, the Honorable William C. Stuart presiding, found that admission of the confession did not violate the *Miranda* rule but was a denial of due process. *Collins v. Auger,* 428 F. Supp. 1079 (S. D. Iowa 1977). In view of the intervening decision of *Wainwright v. Sykes,* 433 U. S. 72 (1977), this court on appeal remanded the cause to the district court to certify its findings as to whether there had been a contemporaneous objection in the state trial court as to the due process issue and, if not, whether petitioner demonstrated "cause" and "prejudice" under the new standards adopted in *Sykes,* as originally set out in *Francis v. Henderson,* 425 U. S. 536 (1976). Upon remand the district court vacated its prior order and denied relief.

Prior to his state trial petitioner filed an application for a mental evaluation to determine his competency to stand trial. The application was granted, and petitioner was interviewed a number of times by Dr. Romullo Lara at the Iowa Security Medical Facility at Oakdale. During the course of the interviews, petitioner confessed to Dr. Lara that he had committed the crime for which he was charged.

At petitioner's trial the statements made to Dr. Lara were admitted into evidence despite defense counsel's repeated objections on the basis of physician-patient privilege, the hearsay rule, and self-incrimination. In affirming the conviction the Supreme Court of Iowa held that admission of the statements made to Dr. Lara did not violate Collins' rights despite the absence of *Miranda* warnings prior to the interviews. Justice Rawlings filed a special concurring opinion in which he agreed that no *Miranda* violation had occurred but indicated that admission of the statements may have been a violation of due process. 236 N. W. 2d at 379.

Contemporaneous Objection Rule.

The State contends that during the proceedings in the state trial court and on direct appeal, defense counsel did not specifically object to admission of the confession on due process grounds. Prior to *Francis* and *Sykes,* counsel's failure to object to constitutional error would not preclude habeas corpus relief in federal court unless a knowing, deliberate waiver was shown. *Fay v. Noia,* 372 U. S. 391 (1963); *Harris v. Brewer,* 434 F. 2d 166, 168 (8th Cir. 1970). Only where it could be shown that the failure to make an objection was deliberate, for reasons such as trial strategy, was the defendant held to have waived the objection. *Cf. Pope v. Swenson,* 395 F. 2d 321, 322-23 (8th Cir. 1968). The fact that the state had a procedural forfeiture rule which required a contemporaneous objection before trial errors could be later asserted on collateral attack did not limit a petitioner's right to assert constitutional issues in a federal habeas corpus action. *See Harris v. Brewer, supra* at 168.

In *Francis* and *Sykes*, the Supreme Court narrowed the application of the deliberate bypass doctrine, holding that, absent compliance with an applicable state contemporaneous objection rule, a state prisoner could assert alleged trial errors in a federal habeas corpus action only after showing "cause" for not making a contemporaneous objection and "prejudice" from the alleged error. In reaching this conclusion the Court recognized that, under principles of federalism, state procedural forfeiture rules are entitled to greater respect than that granted by the deliberate bypass rule. 433 U. S. at 88-89.

On remand in the present case, the district court found that petitioner had failed to make an adequate contemporaneous objection to the admission of his statements to Dr. Lara and thus was required to establish both cause for his failure to object and prejudice from the erroneous admission. The court found that cause had been shown but concluded that, although admission of the testimony was not harmless error, no prejudice had been established. The district court therefore vacated its prior order and refused to grant the writ of habeas corpus. We now vacate the district court's order and direct that the court conditionally grant a writ of habeas corpus.

Although defense counsel did not specifically challenge the admissibility of the confession in the trial court on due process grounds, the fact remains that repeated objections were made at trial to the admission of the statements. The record thus indicates that the trial court, as well as the Supreme Court of Iowa, was alerted to evidentiary and constitutional issues pertaining to the confession's admissibility. As Judge Stuart recognized,

since one member of the Supreme Court of Iowa dealt with the due process issue, it must have been brought to the state courts' attention. We conclude that petitioner asserted an adequate contemporaneous objection in the state proceedings.[1]

Since we find petitioner made a sufficient objection, he is entitled to review of his constitutional claims on the merits. The district court found that admission of the statements to Dr. Lara violated petitioner's due process rights:

> [I]t is fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecution's case to establish his guilt. . . .
>
> The defendant is entitled to raise his mental condition at the time of the offense as a defense. He is also entitled, under proper circumstances, to an examination to determine his competency to stand trial. Psychiatric examinations are essential to the proof of his mental condition. An indigent must seek a court order authorizing the examination and the payment of its cost. If the giving of a *Miranda* warning satisfied requirements of the Fifth Amendment and the Fourteenth Amendment and made the defendant's incriminating admissions admissible, the defendant would be placed in a situation where he must sacrifice one Constitutional right to claim another.
>
> If a defendant cooperated with the psychiatrist and made a full disclosure of his thinking processes

---

1 The State of Iowa has conceded in federal district court that the petitioner had exhausted his state remedies on the constitutional issue raised. Federal courts may in interest of justice and expedition accept waiver of exhaustion by the state, *Jenkins v. Fitzberger*, 440 F. 2d 1188, 1189 (4th Cir. 1971), because the doctrine of exhaustion is one of comity.

> and his background, including incriminating statements and if he failed to establish his lack of mental capacity, he would be faced with these admissions on trial. If a defendant exercised his right to remain silent and refused to cooperate with the psychiatrist the likelihood of a meaningful and reliable examination would be considerably decreased and his opportunity to urge a possible defense thwarted. A defendant should not be compelled to choose between exercising his Fifth Amendment right not to incriminate himself and his due process right to seek out available defenses.

Collins v. Auger, 428 F. Supp. 1079, 1082-83 (S. D. Iowa 1977).

See also State v. Evans, 104 Ariz. 434, 454 P. 2d 976 978 (1969) (en banc). *Cf. Simmons v. United States*, 390 U. S. 377, 393-94 (1968); *United States v. Reifsteck*, 535 F. 2d 1030, 1034 n. 1 (8th Cir. 1976). We agree with this reasoning and with Judge Stuart's conclusion that the error was not harmless.

Cause and Prejudice.

Even assuming, however, that petitioner did not properly challenge the admission of the statements and the "cause" and "prejudice" test required by *Sykes* is properly before us, we find the writ should nonetheless issue.

We agree with Judge Stuart's finding that cause for failure to specifically object on due process grounds was established.[2] However, we find that the district

2 The district court found that defense counsel's failure to assert an objection based on due process was not a matter of trial strategy, but was the result of counsel's unawareness of the due process violation. The court concluded that "lack of knowledge of the facts or law would be sufficient cause for failure to make the proper objection within the 'cause and prejudice' test of the *Francis* rule."

court's conclusion that no prejudice had been established was clearly erroneous.

The Supreme Court did not define the term prejudice in *Sykes*. See 433 U. S. at 90-91. Two Justices indicated that prejudice was to be determined under the harmless error test. *See* 433 U. S. at 97-98 (White, J., concurring); 433 U. S. at 117 (Brennan, J., dissenting). Under the harmless error standard, prejudice could be established by showing that it is reasonable to assume the evidence wrongfully admitted influenced the trier of fact in determining the issues of the case. *See Chapman v. California*, 386 U. S. 18, 23 (1967); *Kotteakos v. United States*, 328 U. S. 750, 764-65 (1946). It is urged by the State that the majority of the Court in *Sykes* intended the term prejudice to encompass a more rigorous test. One such test is set out in *United States v. Agurs*, 427 U. S. 97 (1976), and establishes a standard to be applied in determining the materiality of an omission of exculpatory evidence which the prosecution has failed to disclose to defense counsel. The Court found that in order to require a new trial

> the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 112-13 (footnote omitted).

This view, in contrast to the harmless error test, requires a subjective evaluation of guilt by the appellate court

based on the overall record. *Id.* at 113-14. Assuming the Supreme Court intended that this standard be applied in determining the existence of prejudice as required by *Sykes*, we nonetheless find on the basis of the overall state record that prejudice has been established. Applying the *Sykes* language to the record here, we are unable to conclude that "[t]he other evidence of guilt presented at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting . . . from the admission of [the] inculpatory statement." 433 U. S. at 91.

The record shows the victim was unable to positively identify the petitioner as her assailant; other evidence consisted of a latent fingerprint of petitioner lifted from an unknown location in the victim's home and a footprint found near the victim's home which was not clearly identified as petitioner's but was made by the "same type of shoe."[3] Under the circumstances we hold that, even if application of the cause and prejudice test of *Sykes* was required in this case, both have been established regardless of whether prejudice is to be defined according to the harmless error standard or a more strict standard. We therefore conclude that the writ of habeas corpus should issue.

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3 We have on prior occasions recognized the speculative nature of footprint evidence, especially where, as in the present case, no expert testimony clearly establishes a link between the footprint and the shoes worn by the defendant. *See McDonnell v. United States*, 455 F. 2d 91, 94-95 (8th Cir. 1972). *See also McClard v. United States*, 386 F. 2d 495, 506-07 (8th Cir. 1967) (Lay, J., dissenting), cert. denied, 393 U. S. 866 (1968).

The trial court's supplementary order denying the writ is vacated; the cause is remanded to the district court. The State of Iowa is entitled to a reasonable time to retry petitioner for the crime charged. Pending retrial by the State, the district court is instructed to stay further proceedings. Upon retrial, the present petition for habeas corpus should be dismissed. If retrial is not granted within a reasonable time, to be determined on remand by the federal district court, the court is directed to grant the petition for a writ of habeas corpus.

The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

GARY JAMES COLLINS,
Petitioner,

vs.

CALVIN AUGER,
Respondent.

(Filed: March 30, 1977)

MEMORANDUM OPINION AND ORDER

STUART, District Judge.

The matter before the Court concerns the application of state prisoner, Gary Collins, for habeas corpus relief pursuant to 28 U.S.C. § 2254. On July 18, 1974 petitioner was convicted by a jury of assault with intent to commit rape in violation of section 698.4 of the Iowa Code (1973). On appeal to the Supreme Court of Iowa the conviction was affirmed. *State v. Collins,* 236 N.W. 2d 376 (Iowa, 1975). A petition for certiorari was filed with the United States Supreme Court but subsequently denied. See *Collins v. Iowa,* 426 U.S. 948, 96 S.Ct. 3166, 49 L.Ed. 2d 1184 (1976). Although petitioner has made no application for post conviction relief the Court believes and the State concedes that he has adequately exhausted his state remedies as is required under 28 U.S.C. § 2254. Petitioner presents in this Court the same issue that was presented to the trial court in the form of motions and objections, to the Iowa Supreme Court on Appeal, and in the petition for certiorari. See *Wilwording v. Swenson,* 404 U.S. 249, 92 S.Ct. 407, 30

L.Ed 2d 418 (1971); *Coney v. Wyrick,* 532 F. 2d 94, 99-100 (8th Cir., 1976); *Rice v. Wolff,* 513 F. 2d 1280 (8th Cir., 1975), reversed on other grounds (filed July 6, 1976), 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067.

Petitioner was arrested in January of 1974 and subsequently indicted by County Attorney Information on January 28, 1974. On January 31, 1974 petitioner filed an application for a mental evaluation regarding both competency to stand trial and possible medical treatment. Pursuant to Court Order on February 20, 1974 petitioner was admitted for psychiatric evaluation at the Iowa Security Medical Facility at Oakdale and remained in such institution, under examination, until May of 1974. During this period petitioner was interviewed, apparently with some degree of frequency, by Dr. Rumullo Lara. In the course of these interviews approximately seven hours were devoted to eliciting and developing background information. Four to five days after his initial admittance petitioner began receiving prescription tranquilizers because of his nervous state.

During the course of Dr. Lara's questioning certain facts were elicited dealing with both petitioner's knowledge of the contents of the County Attorney's Information and his own version of the factual background of the alleged offense for which he was in custody. It is conceded by respondent that no "formal" *Miranda* warnings were given during any part of the questioning. Dr. Lara, over numerous objections, testified in the State's case in chief as follows:

Q. Could you relate to us the, doctor, your conversations with Gary as to what his opinion was as to the fact which occurred on January 6, 1974?

A. I need clarification if I may, when you say what his opinion was.

Q. What did he relate to you happened on January 6th that occasioned him to be taken into custody?

A. I'll quote from the history.

Mr. Krohn: This is objected to again as hearsay.

The Court: Overruled.

A. This is a quote from the psychiatric history. 'Since November, 1973, he had been employed in Iowa working for Confinement Construction Company. He shared a room with a co-employee in Lambs Grove, and this friend would drive him to work. Since his birthday was nearing, he decided to take off from work for three days between January 4 and January 6, finding lodging in the Churchill Hotel in Newton, and he had been drinking in that town, and after returning to Lambs Grove that particular evening, January 6th, he had been hitchhiking along Highway 6 at about ten p.m., and caught sight of a home which is three units housing different families. Feeling quite cold, he had approached this residence going up the stairs and knocking on the door. The victim accommodated him and he had requested to use her telephone so he could call his friend "Deano" to fetch him. His friend, however, was unavailable. Mrs. Andrews, in the meantime, had served him a cup of coffee and peanut butter sandwich. He introduced himself and told her where he was employed. It was then that he asked, "What do you think of rape?" She was startled and seemed panic-stricken. She

responded, "I think you have overstayed your welcome", and had opened the door for him to leave. This angered him and he had bolted the door shut. He threw her in bed and remarked, "I'm going to ball you", and she began screaming and he slapped her. She bit his little finger drawing blood. This further angered him and he beat her and stripped off her clothing. He says that at that time he was both angry and lustful willing to get his pleasures from anyone available. No rape was completed, however, saying that when he had stripped her it was sicking to see. Feeling afraid of himself, he ran away by the backyard.

• • • • •

Q. With the investigations, tests, and observations you've told us about with regard to Mr. Collins, also were you present in the Courtroom when Mrs. Andrews testified?

A. I was.

Q. Did you hear her testify in full as to what occurred in her opinion at her apartment on the night in question?

A. For the most part, yes. Her voice tended to falter a little bit.

Q. Are the facts which you heard from Mrs. Andrews the same facts which you were advised by my office and the same facts upon which you particularly based your conclusion? Specifically I'm referring to the telephone cord having been ripped out, the conversation that took place between she and Mr. Collins, these areas?

A. That is correct.

The record is also clear that petitioner did voluntarily disclose to Dr. Lara the facts surrounding the alleged offense.

Q. Did you at any time assure him that the statements that he made about these events on the 6th day of January would not be repeated?

A. No. As a matter fact he wanted it divulged at that time.

Petitioner urges that his current twenty year period of incarceration is unlawful in that the conviction was obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights because: (1) He was not given proper *"Miranda"* warnings prior to the questioning by the state psychiatrist during the course of the psychiatric evaluation; and (2) His incriminating statements made to the psychiatrist during the course of his psychiatric examination were introduced by the state in his trial to prove his guilt.

Miranda

The Court agrees with Iowa Supreme Court that the prophylactic rules of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its progeny should not be extended to encompass the kind of situation involved herein. *State v. Collins, supra,* 236 N.W. 2d at 378. The giving of the *Miranda* warnings prior to a psychiatric examination would be highly inappropriate. The full and free disclosure of information and the patient's thinking processes, so essential to a meaningful psychiatric examination, would be frustrated if the patient were advised of his right to counsel and his right to remain silent and informed that his statements could be used against him in a criminal trial to prove his guilt. The importance of psychiatric testimony in resolving the issues of defendant's sanity at the time of the offense or his ability to aid in his own defense has been firmly

established. The defendant should not be placed in the position of either refusing to give full cooperation to the psychiatrist or waiving his objection to the introduction of incriminating admissions. The Court concludes that the manner in which the statements were elicited were thoroughly proper. This does not, however, preclude consideration of the impact of the use of those statements at trial.

Fundamental Fairness

The majority opinion in Collins' appeal to the Supreme Court of Iowa, *State v. Collins,* supra, limited the court's decision to the inapplicability of *Miranda,* which was the sole issue raised in defendant's assignment of error, stating the issue as follows:

> [W]hether statements made by a defendant to a state psychiatrist examining him pursuant to a court order entered upon the defendant's application are admissible against the defendant at trial when the statements were made without prior *Miranda* warnings to the defendant by the psychiatrist.

Id., at 378.

The question of fundamental fairness under the Fourteenth Amendment to the United States Constitution was not discussed in the majority opinion. However, Justice Rawlings in his special concurrence expressed deep concern about the effect of the introduction into evidence of self incriminating statements elicited during a psychiatric examination. He thoroughly discussed the problems including that of fundamental fairness and analyzed the cases. The fact that the Iowa Supreme Court was thus alerted to the issue, but did not consider it, is further sup-

port for the court's position that all practical state remedies have been exhausted.

It is well established that a mere evidentiary error committed in the course of a state criminal trial will not constitute such a fundamental deprivation of the guarantees of a fair trial as to rise to a deprivation of due process of law. But varying with the circumstances, errors which operate to affect the jury's consideration of the evidence presented may be so egregious as to deprive a defendant of a fair trial. Where criminal trials in state courts are conducted in such manner so as to disregard that fundamental fairness essential to the very concept of justice, due process is offended and federal court intervention is warranted. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba v. California,* 314 U. S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166 (1941).

In this Court's opinion, it is fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a psychiatric examination as part of the prosecution's case to establish his guilt. It is immaterial in this regard whether the court ordered examination was at the request of defendant or the prosecution or whether it was to determine his capacity to aid in his own defense or his mental condition at the time of the crime. The fundamental unfairness of the introduction of such evidence violates defendant's right to due process under the Fourteenth Amendment to the Constitution of the United States.

The defendant is entitled to raise his mental condition at the time of the offense as a defense. He is also

entitled, under proper circumstances, to an examination to determine his competency to stand trial. Psychiatric examinations are essential to the proof of his mental condition. An indigent must seek a court order authorizing the examination and the payment of its cost. If the giving of a *Miranda* warning satisfied requirements of the Fifth Amendment and the Fourteenth Amendment and made the defendant's incriminating admissions admissible, the defendant would be placed in a situation where he must sacrifice one Constitutional right to claim another.

If a defendant cooperated with the psychiatrist and made a full disclosure of his thinking processes and his background, including incriminating statements and if he failed to establish his lack of mental capacity, he would be faced with these admissions on trial. If a defendant exercised his right to remain silent and refused to cooperate with the psychiatrist the likelihood of a meaningful and reliable examination would be considerably decreased and his opportunity to urge a possible defense thwarted. A defendant should not be compelled to choose between exercising his Fifth Amendment right not to incriminate himself and his due process right to seek out available defenses.

The situation is analogous to the attempt to use defendant's testimony at a suppression hearing in a trial to determine guilt. In *Simmons v. U. S.,* 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), the Supreme Court said:

> Thus, * * * Garett was obliged either to give up what he believed * * * to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimation. In

> these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Congress solved this problem for federal courts in psychiatric examinations to determine a defendant's mental capacity to stand trial by providing:

> No statement made by the accused in the course of any examination into his sanity or mental competency provided for in this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

18 U. S. C. § 4244.

In *U. S. v. Albright,* 388 F. 2d 719, 725 (4th Cir., 1968), a similar restriction was imposed upon disclosures made by a defendant during the course of a court ordered mental examination to determine his criminal responsibility for the act. Many courts have held that admissions made under similar circumstances are not admissible on the question of guilt. *U. S. v. Reifsteck,* 535 F. 2d 1030, 1034 (8th Cir., 1976); *U. S. v. Alvarez,* 519 F. 2d 1036, 1042 (3rd Cir., 1975); *U. S. ex rel. Smith v. Yeager,* 451 F. 2d 164, 165 (3rd Cir., 1971); *U. S. v. Bohle,* 445 F. 2d 54, 66-67 (7th Cir., 1971); *State v. Evans,* 104 Ariz. 434, 454 P. 2d 976, 978 (1969); *People v. Stevens,* 386 Mich. 579, 194 N. W. 2d 370, 371-373 (1971); *People v. Martin,* 26 Mich. App. 467, 182 N. W. 2d 741, 743; *Williamson v. State,*

Miss., 330 So. 2d 272, 275 (1976); *State v. Obstein,* 52 N. J. 516, 247 A. 2d 5, 11-12 (1968); *State v. Whitlow,* 45 N. J. 3, 210 A. 2d 763, 770 (1965); *Lee v. County Court of Erie County,* 27 N. Y. 2d 432, 318 N. Y. S. 2d 705, 267 N. E. 2d 452, 457; *People v. McKinney,* 62 Misc. 2d 957, 310 N. Y. S. 518, 520 (1970).

Some courts have indicated they would exclude psychiatrist's testimony regarding admissions made to him by defendant during the course of a psychiatric examination as a violation of defendant's privilege against self incrimination. *U. S. v. Reifsteck, supra,* 535 F. 2d at 1034; *U. S. v. Alvarez,* supra, 519 F. 2d at 1042; *U. S. ex rel. Smith v. Yeager,* supra, 451 F. 2d at 165; *U. S. v. Albright,* supra, 388 F. 2d at 726. There is merit in this position if it is based on involuntariness rather than the failure to give *Miranda* warnings. Statements to a psychiatrist, which appear to have been made willingly and without coercion, should not be considered as voluntary under the "totality of circumstances" test stated in *Greenwald v. Wisconsin,* 390 U. S. 519, 520-521, 88 S. Ct. 1152, 20 L. Ed. 2d 77. Psychiatrists are trained to create an atmosphere that is conducive to full and free disclosure of whatever is on the patient's mind. The psychiatrist attempts to lull the defendant into divulging all information which might be helpful in determining his mental condition whether incriminating or not. *Stultz v. State,* Tex. Cr. App., 500 S. W. 2d 853, 854-855 (1973). The examination is intimate, personal and highly subjective. *In re Spencer,* 63 Cal. 2d 400, 46 Cal. Rptr. 753, 406 P. 2d 33, 40.

Even though Collins' statements were not made in response to questions and he apparently felt he wanted

to talk about the incident, there was "[N]o suggestion that he intended to make a confession which would incriminate him with the authorities or that he was aware his course of action would be the cause of his conviction in court". *U. S. v. Robinson,* 142 U. S. App. D. C. 43, 50, 439 F. 2d 553, 560 (1970).

The object of the privilege against self incrimination is to:

> [I]nsure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

Counselman v. Hitchcock, 142 U. S. 547, 562, 12 S. Ct. 195, 198, 35 L. Ed. 1110 (1892). See also *Maness v. Meyers,* 419 U. S. 449, 461, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975).

Surely the mischief against which the Fifth Amendment seeks to guard can best be avoided under the circumstances here, not by advising defendant of his right to remain silent, but by permitting him to talk freely with the psychiatrist without running the risk that any incriminating statements can be used against him on the issue of his guilt. Any waiver of his rights suggested by such free disclosure should be limited to issues regarding his mental condition. This is not to suggest that the court believes instructions limiting the purposes for which incriminating statements could be considered would satisfy the requirement of fundamental fairness. A separate hearing might be called for.

In addition to the due process and self incrimination issues, there are strong equal protection arguments which

could be urged in the instant situation. If a criminal defendant could afford a private psychiatric examination, the physician-patient relationship might foreclose the disclosure of incriminating statements made during the course of the examination. See *State v. Evans,* 104 Ariz. 434, 454 P. 2d 976, 978 (1969); *City & County of San Francisco v. Superior Court,* 37 Cal. 2d 227, 231 P. 2d 26. Such relationship is not created when a psychiatrist examines an indigent defendant under court appointment. *In re Spencer,* supra, 63 Cal. 2d at 410, 46 Cal. Rptr. at 760, 406 P. 2d at 40. The Court reaches no decision on this point here.

Notwithstanding the court's strong feeling that the admission of the psychiatrist's testimony was not consistent with the principles of fundamental fairness and consequently denied Collins due process, the court is reluctant to require a new trial. There was ample evidence to sustain a conviction without these admissions. But, I cannot say that the admission of statements of defendant confirming in detail the testimony of the victim was harmless error.

IT IS ORDERED that the petition for writ of habeas corpus is sustained on the condition that the writ for petitioner's release shall not issue if the state within ninety (90) days from the filing hereof takes the initial steps necessary to retry Gary James Collins.

IT IS FURTHER ORDERED that in the event the State of Iowa files a timely appeal from this Memorandum Opinion and Order, the issuance of the writ shall be stayed pending the outcome of such appeal.

APPENDIX C

IN THE SUPREME COURT OF IOWA

Filed December 17, 1975

242

57558

STATE OF IOWA,

Appellee,

vs.

GARY JAMES COLLINS,

Appellant.

Appeal from Jasper District Court—M.J.V. Hayden, Judge.

Appeal by defendant from conviction and sentence for assault with intent to commit rape in violation of § 698.4, The Code.--AFFIRMED.

Frank M. Krohn, of Newton, for appellant.

Richard C. Turner, Attorney General, John G. Mullen, Assistant Attorney General, and Kenneth L. Whitehead, County Attorney, for appellee.

Considered en banc.

McCORMICK, J.

Defendant appeals his conviction and sentence for assault with intent to commit rape in violation of § 698.4, The Code. The questions presented are whether the trial court erred (1) in overruling defendant's motion to dismiss for want of a speedy trial, (2) in overruling his motion for mistrial, (3) in overruling his *Miranda* objection

to testimony of a psychiatrist, and (4) in overruling his motion for directed verdict made at the close of the evidence.

I.

The charge in this case was brought by county attorney's information filed January 28, 1974. Defendant filed a motion to dismiss on July 8, 1974, alleging he had been denied his right under § 795.2, The Code, to be brought to trial within 60 days of the filing of the county attorney's information. The State contended good cause existed for the delay, and the trial court overruled the motion on that ground. Defendant's trial commenced July 17, 1974.

Since defendant was not tried within 60 days after the charge was brought in district court, he was entitled to have the charge dismissed on his timely motion unless the State demonstrated good cause for the delay beyond that period.

Applicable principles are summarized in several recent cases. See e. g., *State v. Albertsen,* 228 N. W. 2d 94, 97-98 (Iowa 1975). In this case, we agree with the finding that good cause for delay was shown. The delay was substantially attributable to defendant. The first three months' delay was caused by compliance with an order of the court sustaining defendant's motion for mental evaluation. Defendant was admitted to the medical security facility at Oakdale for mental examination and evaluation in February and was not released until April 30, 1974. He filed a demand for speedy trial seven days later, on May 7, 1974. At his arraignment on May 13, 1974, he

entered a plea of not guilty. On June 3, 1974, he filed a notice of his intention to rely upon a defense of insanity. § 777.18, The Code. One of the listed witnesses was Dr. Romullo Lara, a psychiatrist who had examined defendant at Oakdale. Two days later the State filed a notice of additional testimony indicating its intention to call Dr. Lara as a State witness. Additional time was taken by a motion in limine filed by defendant. Further delay was caused by fixing the trial date to accommodate Dr. Lara's schedule.

Under this record, the trial court did no err in overruling defendant's motion to dismiss.

II.

Defendant's motion for mistrial resulted from testimony of Dr. Lara as a witness for the State. The witness recited the history taken from defendant. Included in the history was a statement that, "He says * * * he is charged with assault with intent to commit rape, as well as aiding and abetting a jail break." Later, out of the presence of the jury, defense counsel moved for mistrial on the ground this testimony improperly referred to an escape charge for which defendant was not then on trial. The trial court overruled the motion but admonished the jury to disregard the challenged testimony.

A trial court has discretion in ruling upon a motion for mistrial, *State v. Cage,* 218 N. W. 2d 582, 586 (Iowa 1974). The limits of that discretion were not exceeded here.

III.

A second problem arose during Dr. Lara's testimony. He testified he did not require defendant as part of the

psychiatric examination to relate his version of the events upon the assault with intent to commit rape charge was based. Nevertheless, he said defendant wished to explain his version of the incident and did so. When Dr. Lara was asked to repeat what defendant told him, defense counsel objected on the ground defendant had not been given *Miranda* warnings. The objection was overruled, and Dr. Lara repeated defendant's alleged statements.

The sole issue raised in defendant's assignment of error is whether statements made by a defendant to a state psychiatrist examining him pursuant to a court order entered upon the defendant's application are admissible against the defendant at trial when the statements were made without prior *Miranda* warnings to the defendant by the psychiatrist. Defendant contends Dr. Lara should have advised him of his privilege against self-incrimination before discussing the charge with him. See *Miranda v. Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In *Miranda,* the Supreme Court barred the use of statements "stemming from custodial interrogation of the defendant unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The court added, "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U. S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. We have held *Miranda* prohibits law enforcement officials from eliciting incriminating statements by having a third party ask their questions for them. *State v. Flaucher,* 223 N. W. 2d 239 (Iowa

1974); *State v. Cullison,* 215 N. W. 2d 309 (Iowa 1974). However, this case does not present that kind of situation. Defendant was not being subjected to custodial interrogation nor was he being questioned in behalf of law enforcement officers. The *Miranda* warnings were not required. See *Ramer v. United States,* 411 F. 2d 30, 38 (9 Cir. 1969), cert. denied, 396 U. S. 965, 90 S. Ct. 445, 24 L. Ed. 2d 431 ("We are unwilling to expand the mandate of *Miranda* to the extent sought by the appellant."). See generally, Marcus, Pre-Trial Psychiatric Examination: A Conflict With the Privilege Against Self-Incrimination, 5 Crim. L. Bull., No. 10, 497.

The trial court did not err in overruling his defendant's objection to Dr. Lara's testimony.

IV.

In contending the trial court erred in overruling his motion for directed verdict made after both parties rested, defendant asserts the evidence was insufficient for jury consideration on the element of intent. The same argument was made and rejected in *State v. Baskin,* 220 N. W. 2d 882, 887-888 (Iowa 1974). No useful purpose would be served by reciting evidence in this case. It suffices to say that here, as in *Baskin,* the evidence was sufficient to support a fair inference by the jury that defendant had in mind the procurement of sexual intercourse by the use of such force as was necessary to accomplish his purpose.

The trial court did not err in overruling his motion for directed verdict.

We find no merit in defendant's assignments of error.

AFFIRMED.

All Justices concur, except Rawlings, J., who concurs specially.

State v. Collins, No. 242

RAWLINGS, J., (concurring specially)

Confining myself, as does the majority, to the sole "Miranda warning" issue asserted by defendant in support of a reversal, I too find an affirmance is in order.

On the other hand, the situation instantly involved is to me of such magnitude as to justify if not necessitate some overview regarding self-incriminating statements made by an accused in course of a court-ordered psychiatric examination as to sanity at time of the event.

I.

At the outset most, if not all, courts have approached the problem from two separate but interrelated avenues, i. e., court-compelled vs. defense-invited evaluations. It still remains, however, no meaningful evaluation can be achieved in either such instance other than by a thorough, wide-ranging and intimate discussion between an accused and a psychiatrist, designed to elicit in-depth information from the former regarding past crimes or antisocial conduct, personality-molding experiences and subconscious motivating ideas. See *State v. Whitlow,* 45 N. J. 3, 210 A. 2d 763, 771 (1965); Myers, "The Psychiatric Examination", 54 J. Crim. L.C. & P.S. 431 at 435-438 (1963). And any inhibition, direct or indirect, which may be fast-

ened upon such essential dialogue is self-defeating[1], at the same time often beset with tangential troublesome problems, illustratively coercion[2], and possible confinement in perpetuity for defendant's noncooperation.[3]

II.

At this point the matter of self-accusation comes into play.

Admittedly, *Schmerber v. State of California,* 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) says the Fifth Amendment protects an accused only from being compelled to testify against himself, *or otherwise provide the State with evidence of a testimonial or communicative nature,* 384 U. S. at 760-761, 86 S. Ct. 1830-1831.

The *Schmerber* Court also distinguished between admissibility of a blood test on one hand and "compelling communications or testimony" or "compulsion which makes a suspect or accused the source of real or physical evidence." 384 U. S. at 764, 86 S. Ct. at 1832.

It therefore follows, a blood sampling stands on a different footing than does a psychiatric examination. Further in that regard, any determination as to whether statements made in course of the latter are testimonial in nature depends upon usage of the information thus obtained. When employed as evidence going to the issue of guilt or innocence it can be nothing other than com-

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1 26 Stan. L. Rev. 55, 66 (1973).

2 *Leyra v. Denno,* 347 U. S. 556, 559-560, 74 S. Ct. 716, 718, 98 L. Ed. 948 (1954).

3 *Tippett v. State of Maryland,* 436 F. 2d 1153, 1161 (4th Cir. 1971); 26 Stan. L. Rev. at 60. See also Code Chapter 665.

municative or testimonial. See 5 Crim. L. Bull, 497, 501 (1969).

In this vein, most courts have adopted the view that an accused must cooperate, if possible, in the conduct of a psychiatric examination. And generally any statements made by a defendant in couse thereof are deemed admissible in evidence *with regard to the matter or legal responsibility.* But when those relating to guilt are admitted, several courts have held the jury must be instructed on the limited probative force of any such self-incriminating statements, i.e., that they are not to be considered in resolving the guilt issue. See *State v. Obstein,* 52 N. J. 516, 247 A. 2d 5, 11-12 (1968); *State v. Whitlow, supra.* Noticeably, however, *Whitlow* recognized the inherent difficulty juries would inevitably encounter in attempting to obey any such instructional restriction. 210 A. 2d at 773.

Moreover, validity of the aforesaid procedure is at best doubtful. In *Jackson v. Denno,* 378 U. W. 368, 388-389, 84 S. Ct. 1774, 1786-1787, 12 L. Ed. 2d 908 (1964), the Court unmistakably condemned the practice of submitting to a jury the question of voluntariness of a confession together with the guilt issue. By the same token, when a jury, as in the case at bar, has heard a psychiatrist relate incriminating statements made to him by an accused during a mental examination, those utterances unavoidably become so deeply implanted no juror could disregard them even though told by the court to do so. In any event, it will usually if not always, be subconsciously the decisive factor whenever uncertainty lingers in the mind of a juror as to proof of guilt beyond a reasonable doubt.

A few jurisdictions have attempted to circumvent the above quandary by adoption of a bifurcated hearing or "sequential order of proof" approach. Such is, however, a relatively cumbersome and expensive procedure to be avoided where reasonably possible. See Louisell & Hazard, Insanity as a Defense: The Bifurcated Trial, 49 Calif. L. Rev. 805 (1961); 5 Crim. L. Bull. 497, 504 (1969); 10 Am. Crim. L. Rev. 431, 458-463 (1972), I shall later return to this subject.

Another proposed solution, voiced in *Pope v. United States,* 372 F. 2d 710 (8th Cir. 1967), is adoption of the "waiver" theory where an accused has requested the psychiatric examination. See generally *United States v. Schultz,* 431 F. 2d 907, 911 (8th Cir. 1970). But see *Commonwealth v. Porporti,* 447 Pa. 154, 284 A. 2d 708, 710-711 (1971). Several troublesome questions are also here involved. Surely, an insanity plea cannot be equated with intentional waiver of the Fifth Amendment privilege against self-incrimination. Otherwise, a defendant is placed on the horns of an imponderable dilemna. By electing to assert an insanity defense he waives his privilege against self-incrimination. The unconscionability of this paradox is self-evident. As observed in *State v. Raskin,* 34 Wis. 2d 607, 150 N.W. 2d 318, 326 (1967):

> "It is argued also by the state the filing of the plea of insanity waives any privilege of self-incrimination and therefore the accused must answer questions in the examination even though the responses may be incriminatory. We do not agree. This concept puts a *quid pro quo* or price tag on the assertion of the plea of insanity."

Touching on the same point is *Simmons v. United States,* 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed. 2d 1247 (1968) where the Court declared: "[I]t [is] intolerable that one constitutional right should have to be surrendered in order to assert another." See also 10 Am. Crim. L. Rev. at 450-452.

I further find more than minimal cogency in this statement by Black, J., dissenting in *Williams v. Florida,* 399 U.S. 78, 112, 90 S.Ct. 1893, 1912, 26 L.Ed. 2d 446 (1970):

> "The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it!'"

It is also well settled, in this jurisdiction, that if an accused pleads not guilty by reason of insanity the State must prove, beyond a reasonable doubt, all elements of the offense charged, including defendant's legal capacity to commit the offense. See *State v. Thomas,* 219 N.W. 2d 3, 5 (Iowa 1974); case note, 24 Drake L. Rev. 246 (1974); Annot., 17 A.L.R. 3d 146.

By virtue thereof it has been held that when a defendant places his or her sanity in issue the State may have benefit of a concomitant psychiatric examination. See *United States v. Schultz,* 431 F. 2d at 910-911; *United States v. Albright,* 388 F. 2d 719, 722-726 (4th Cir. 1968); *State v. Whitlow, supra; Lee v. County Court of Erie County,* 27 N.Y. 2d 432, 318 N.Y.S. 2d 705, 712, 267 N.E. 2d 452, 457, cert. denied 404 U.S. 823 (1971). See

also Breitel, J., concurring in *People v. Avant,* 33 N.Y. 2d 265, 352 N.Y.S. 2d 161, 167, 307 N.E. 2d 230, 234 (1973); 26 Stan. L. Rev. at 63-65. But see *United States v. Davis,* 496 F. 2d 1026, 1030-1031 (5th Cir. 1974); *Commonwealth v. Pomponi,* 284 A. 2d at 709-711. Here again, the above noted coercion problem is involved. Additionally, the defendant may be inclined to deceive and suppress evidence while being thus compulsorily examined. See 26 Stan. L. Rev. at 66.

Finally, on this subject, it is questionable whether the "waiver" concept is legitimately applicable in a situation such as instantly presented. See *State v. Holderness,* 191 N.W. 2d 642, 646 (Iowa 1971). See also *People v. Avant, supra;* 83 Harv. L. Rev. 648, 667 (1970).

Mindful of the foregoing, it is to me apparent the unbridled testimonial use of a defendant's self-incriminating statements to a psychiatrist in course of an examination as to the accused's sanity at time of the event is beset with unavoidable perplexities and an insurmountable fair-play barrier.

III.

The spotlight now focuses upon a defense-invited psychiatric analysis as opposed to compelled evaluation of defendant's mental status stemming from a prosecution request or sua sponte court order.

First considered is the examination brought about by reason of an indigent defendant's request. See Hall, Kamisar, LaFave and Israel, Modern Criminal Procedure, 151-159 (3d ed 1969); Annot., 34 A.L.R. 3d 1256, 1275-1282. In such event the accused is supplied the

benefit of a medical diagnosis at State expense which he, if affluent, could have otherwise obtained. See *Griffin v. People of the State of Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L. Ed. 891 (1956). And, as this court said in *State v. Bedel,* 193 N.W. 2d 121, 124 (Iowa 1971):

> "The physician-patient privilege is intended to foster free and full communication between the physician and the patient in diagnosis or treatment of the patient's ills. This privilege is not designed, nor will it be so extended, to act as a shield behind which a patient may conceal information, though made to his physician, which is not necessary and proper to enable the physician to perform his profession skillfully. See *Gibson v. Ladd,* Blood Test to Determine Intoxication, Physician-Patient Privilege, 24 Iowa L. Rev. 191, 255-256 (1939); Wigmore, Evidence, § 2380a, pp. 828-832."

It could therefore be plausibly argued the physician-patient privilege is applicable to any such defense-invited examination. Supportively, the court said in *State v. Evans,* 104 Ariz. 434, 454 P. 2d 976, 978 (1969):

> "The obvious policy underlying the physician-patient privilege is that patients should be encouraged to make full and frank disclosures to those who are attending them. While we do not believe that allowing [a doctor] to testify about his conclusions concerning defendant's sanity derogates from this policy, we do think that to permit even a psychiatrist acting for the court to transmit a defendant's incriminating statements to a jury is fundamentally unfair. In *Lisenba v. People,* 314 U.S. 219, 62 S.Ct. 280, 86 L. Ed. 166 (1941), Justice Roberts stated: 'The aim of the requirement of due process is • • • to prevent fundamental unfairness in the use of evidence whether true or false.' 314 U.S. at 236, 62 S.Ct. at 290."

Understandably, the defendant may waive any such privilege, either intentionally or by invitation, i.e., "opening the door" in course of trial. See *United States v. White,* 377 F. 2d 908, 911 (4th Cir. 1967), cert. denied, 389 U. S. 884, 88 S. Ct. 143. See generally McCormick on Evidence, § 134 (2d ed 1972). But as to waiver by absence of testimonial objection see *United States v. Davis,* 496 F. 2d at 1030-1031.

Next entertained is the matter of compulsory psychiatric examination of an accused, either upon request by the prosecution or sua sponte order of the court. Here the psychiatrist becomes an agent for the State. Singularly pertinent is this statement from In re Spencer, 46 Cal. Rptr. 753, 406 P. 2d 33, 40 (1965):

> "In Massiah v. United States, supra, 377 U. S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246, the United States Supreme Court held that 'the petitioner was denied the basic protection of that guarantee [of counsel] when there was used against him at his trial evidence of his incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.' Although the court-appointed psychiatrist, an agent of the court, does not necessarily seek to elicit incriminating statements for use by the prosecution as did the agent in Massiah, he does question a defendant about the facts of the crime, and any incriminating statements of a defendant so procured may be utilized by the prosecution at the guilt trial.
>
> "The fact that the purpose of the psychiatric interview is not to gather evidence for the prosecution serves to compound the unfairness of the psychiatrist's testimony; an agent of the court in reality lulls a defendant into making incriminating statements that may be used against him at the guilt trial.

> (Cf. *Leyra v. Denno* (1954) 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948; Diamond & Louisell, The Psychiatrist as an Expert Witness: Some Ruminations and Speculations (1965) 63 Mich. L. Rev. 1335, 1349). The psychiatric examination occurs during a '"critical period of the proceedings"' (*Massiah v. United States, supra,* 377 U. S. 201, 205, 84 S. Ct. 1199, 12 L. Ed. 2d 246); if defendant's statements to the psychiatrist may be introduced at the guilt trial, defendant's need of counsel is as acute during the psychiatric interview as during the police interrogation."

See also Marshall, J., dissenting to dismissal of certiorari in *Miller v. State of California,* 392 U. S. 616, 88 S. Ct. 2258, 20 L. Ed. 2d 1332 (1968); cf. *State v. Cullison,* 215 N. W. 2d 309, 314-315 (Iowa 1974).

It may therefore be reasonably contended the Fifth Amendment privilege becomes applicable in the above noted situation. See Harlan, J., concurring in *California v. Byers,* 402 U. S. 424, 435-437, 91 S. Ct. 1535, 1541-1542, 29 L. Ed. 2d 9 (1971); *United States v. Albright,* 388 F. 2d at 726; *State v. Obstein,* 247 A. 2d at 10-11; *Haskett v. State,* 255 Ind. 206, 263 N. E. 2d 529, 531 (1970); 8 Wigmore on Evidence, §§ 2251-2252 (McNaughton rev. 1961); 10 Am. Crim. L. Rev. at 434-458; 5 Crim. L. Bull. at 500-506.

There may also be some degree of authenticity in an argument to the effect the physician-patient privilege is here again applicable. See *State v. Evans, supra.*

IV

The foregoing panoramic backdrop of untoward elements makes it to me evident the problem at hand can

and should be resolved by adoption of a suitable, inoffensive and realistic standard.

I would therefore hold that where a defendant is examined as to his or her sanity as bearing upon the accused's criminal responsibility for the act charged, whether such be initiated by the defendant, the prosecution or sua sponte order of the court, any self-incriminating information obtained from an accused in course thereof shall not be admitted in evidence, over appropriate objection, during trial of the examined defendant in which guilt or innocence is to be determined. See *United States v. Davis,* 496 F. 2d at 1030-1031; *People v. Stevens,* 386 Mich. 579, 194 N. W. 2d 370, 371-373 (1972). The aforesaid objection can, of course, be effectively voiced before trial. See *State v. Untiedt,* 224 N. W. 2d 1, 3 (Iowa 1974).

It is understood, however, that if defendant (1) first knowingly consents to the introduction of such otherwise precluded testimony or (2) opens the door to the subject matter in course of trial, he may not then effectively complain since his own strategy has invited presentation of such evidence. See *United States v. Davis,* 496 F. 2d at 1030.

The foregoing standard is, in my humble opinion, essential to a fair trial while still permitting introduction of other admissible opinion evidence regarding a defendant's sanity at time of the event.

V.

If, however, it be found that a psychiatrist is unable to testimonially evaluate defendant's legal responsibility

absent reference to incriminatory statements made by the accused, then a bifurcated hearing would be unavoidable and appropriate. In that event, trial on the guilt issue should be first held and if the accused is found guilty a jury determination as to legal responsibility would follow. See generally *Contee v. United States,* 410 F. 2d 249, 250 (D. C. Cir. 1969); *Holmes v. United States,* 363 F. 2d 281, 282-283 (D. C. Cir. 1966); *State v. Raskin,* 150 N. W. 2d at 326; 10 Am. Crim. L. Rev. at 458; 5 Crim. L. Buil. at 504; 1964 Wis. L. Rev. at 681.

Of course, justice would be better served and the procedural process expendited by a pretrial ascertainment regarding the psychiatrist's ability to express his or her opinion as to defendant's legal responsibility without reference to self-incriminating statements by the accused. See *State v. Peterson,* 219 N. W. 2d 665, 668-669 (Iowa 1974).

Whether separate juries must be provided should a bifurcated hearing be necessary is a question which need not be now resolved. Compare 10 Am. Crim. L. Rev. and 5 Crim. L. Bull., both *supra,* with 1964 Wis. L. Rev. cited above. See also *State v. Monroe,* — N. W. 2d — (Iowa, November 1975).

APPENDIX D

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."